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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

No. 503

■

FREDERICK FRANCIS ZIEBER, JR.

Petitioner

v.

THE UNITED STATES OF AMERICA

Respondent

■

PETITIONER'S REPLY
to Memorandum in Opposition

HAYDEN C. COVINGTON
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

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MAY IT PLEASE THE COURT:

Falbo v. *United States,* 320 U. S. 549, does not apply because the administrative appellate agency acted in petitioner's case. Petitioner is like Dodez. *Dodez* v. *United States,* 329 U. S. 338. Although petitioner did not appeal, the local board sent the case up to the appeal board. Therefore the administrative remedies were exhausted. Compare *Johnson* v. *United States,* 126 F. 2d 242 (C. C. A. 8th), with *Tung* v. *United States,* 142 F. 2d 919 (C. C. A. 1st).

The privilege of filing the statement upon appeal granted by Section 627.12 of the Selective Service Regulations (6 F. R. 6845) being optional with the petitioner does not excuse the local board from doing its duty. "The government contends that any deficiency in the record on appeal was immaterial and gave the defendant no right to complain because he had the power himself to correct the record under the provisions of § 627.12 of the Selective Service Regulations which provide that a registrant who takes an appeal to the board of appeal 'may attach to his notice of appeal or to the Selective Service questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.' In our opinion this regulation does not relieve the local board of its duty in the premises or mitigate the consequences of a failure on its part. The regulation confers a privilege but does not impose a duty upon the registrant; for it cannot be supposed that Congress intended to deal with registrants as if they were engaged in formal litigation, assisted by counsel, and therefore charged with the obligation to examine and approve a record on appeal." *Smith* v. *United States,* 157 F. 2d 176, cert. denied 67 S. Ct. 189, rehearing denied, 67 S. Ct. 367.

Regardless of the controverted fact or the dispute between the testimony of the clerk and of the petitioner as to what transpired upon the personal appearance, the indictment should be dismissed. The Government's own witness swore to facts which established the violation of the regulations as a matter of law. In determining whether the indictment should be dismissed the Government's evidence

should be accepted as true. Since it must be taken as correct the indictment should be dismissed.

Also the indictment should be dismissed because there was, as a matter of law, no basis in fact for the denial of the claim for exemption. The classification was without basis in fact. For this reason the indictment should have been dismissed, the *non-precedent* decision of *Cox* v. *United States,* Nos. 66-68, decided November 24, 1947, notwithstanding.

HAYDEN C. COVINGTON
Counsel for Petitioner

January, 1948.